

**Rhone-Poulenc, Inc. and Oil, Chemical & Atomic Workers International Union, AFL-CIO, Local 8-948, Petitioner. Case 4-RC-15478**

15 August 1984

# DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND HUNTER

The National Labor Relations Board, by a three-member panel, has considered objections to an election held 21 December 1983 and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 24 for and 20 against the Petitioner, with 1 challenged ballot, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions<sup>1</sup> and briefs, has adopted the Regional Director's findings and recommendations, and finds that a certification of representative should be issued.

In its evidence in support of objections, the Employer raised allegations of misconduct unrelated to its timely filed objections. The Regional Director refused to investigate this unalleged misconduct because the Employer failed to show that the evidence was not only newly discovered but also previously unavailable. We find that the Regional Director properly refused to expand the scope of his investigation to include consideration of the Employer's allegations. Our dissenting colleague, however, would remand this case for consideration of the unalleged misconduct because it was submitted within the time allowed for submission of supporting evidence and because the Regional Director had not yet begun his investigation.

The Board's Rules and Regulations provide five working days from the date of the election in which a party may file objections to the conduct of and conduct affecting the results of the election. Board Rules and Regulations, Section 102.69(a). The filing of objections and submission of supporting evidence triggers an investigation by the Regional Director. The Board's time limitation on filing requires parties to act promptly in unearthing and reporting to the Region any potentially objectionable conduct. In establishing this 5-day rule, the Board sought to prevent the piecemeal submission of objections which necessarily delays the Regional

Director's investigation. Although mindful of these concerns, the Board will consider evidence of misconduct unrelated to the timely filed objections, but only when the objecting party demonstrates by clear and convincing proof that the evidence is not only newly discovered but was also previously unavailable.

Our dissenting colleague concedes that, in the instant case, the Employer has failed to meet this burden. Nonetheless, our colleague argues that the Regional Director should have considered the misconduct as this case presents a "special circumstance" in that the Employer proffered the allegations *within* the time permitted for submitting supporting evidence and *before* the Regional Director started his investigation. Contrary to the dissent, we are not persuaded by the facts of this case that any special circumstance exists that would justify permitting the Employer to file untimely objections.

## CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Oil, Chemical & Atomic Workers International Union, AFL-CIO, Local 8-948 and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

**INCLUDED:** All production, maintenance, warehouse, shipping and receiving employees employed by Rhone-Poulenc, Inc. at its 1669 Corporate Road West and 1145 Towbin Avenue, Lakewood, New Jersey facility.

**EXCLUDED:** All office clericals, laboratory technicians, managerial employees, guards and supervisors as defined in the Act.

MEMBER HUNTER, dissenting in part.

I would remand this proceeding to the Regional Director to consider the allegations of misconduct raised for the first time by the Employer in its 3 January 1984 letter to the Regional Director. I think the Regional Director's refusal to consider these further allegations in the particular circumstances here was in error.

The election here was held 21 December 1983. The Employer timely filed three separate objections to the election. On 28 December 1983 the Acting Regional Director acknowledged receipt of these objections and gave the Employer until 5 January 1984 to submit the evidence available to it in support of these objections. The Employer claims it submitted certain evidence by letter dated 30 December 1983, and additional evidence on the

<sup>1</sup> In the absence of exceptions thereto, we adopt, pro forma, the Regional Director's recommendation to overrule the Employer's Objection 2 alleging that the Petitioner misrepresented the amount of union dues members would be required to pay.

objections by letter dated 3 January 1984. In that later submission, the Employer also included an affidavit alleging that one employee had threatened other employees, and that another employee was offered a benefit if the Union won the election. These two allegations were not covered in the three previously submitted objections.

The Regional Director did not consider these latter two allegations. He found the allegations unrelated to any of the three objections previously filed, and thus found them untimely absent a showing, not made here, that they were newly discovered and previously unavailable. He cited for this conclusion *Burns Security Services*, 256 NLRB 959 (1981); *Tuf-Flex Glass*, 262 NLRB 445 (1982); and *Parks Food Service*, 235 NLRB 1410 (1978). I find all these cases distinguishable from the instant situation, and I conclude that the Regional Director was in error in rejecting these further allegations on the basis he used.

In *Burns*, the Board refused to consider certain further allegations of misconduct proffered on two occasions by the objecting party because those allegations were unrelated to the original timely submitted objections and were not shown to be previously unavailable and newly discovered. But, importantly, the first set of additional allegations was submitted some 40 days, and the second some 70 days, after the objections had been filed; the allegations appear to have been submitted after the time had expired for the submission of evidence supporting the timely objections; and were apparently submitted after the Region had begun its investigation of the timely submitted objections. In rejecting various of these submissions, the Board relevantly noted that "the period during which the [Region's] investigation proceeds was never intended to provide more time for the objecting party to extend its own investigation in the hope of finding a basis for objection that lies beyond the matters covered in

the [Region's] investigation." 256 NLRB at 960. There are two critical differences between this case and *Burns*. First, here the Employer submitted its additional allegations and supporting evidence *within* the time allowed for submission of supporting evidence on the original objections. Secondly, no Regional investigation appears to have yet begun when these additional allegations were submitted. In this latter regard, the Region noted in its 28 December 1983 letter to the Employer that no such investigation would begin without the evidence supporting the original objections first being submitted to the Region. As noted, not all of that evidence had been submitted when the Employer raised its additional allegations and thus it appears, contrary to *Burns*, that the Region's investigation had not yet begun. Hence, the concerns raised by the Board in *Burns* are not present here.

Likewise, *Tuf-Flex Glass* and *Parks Food Service* are distinguishable. In each, additional allegations of misconduct were raised for the first time in the objecting party's *exceptions* to the Board—in *Tuf-Flex* after an initial report by a hearing officer, and in *Parks Food* after a report by a regional director. That is hardly the situation here in which the additional allegations were submitted *before* the time had expired for submitting evidence in support of the original objections.

In sum, the Employer admittedly did not include these two other allegations in its original objections, but nonetheless it submitted these allegations *and the evidence it relied on to support these allegations* before the time had expired to submit evidence on the original objections and prior to the Region's beginning its investigation on those objections. The Region, under this special circumstance, was in error in failing to consider them. I would remand the case to the Regional Director for such consideration.